MISKINAH JAYA & ORS.

v.

MOHAMED SALLEH & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 61 OF 1979]
16 AUGUST 1983

CIVIL PROCEDURE: *Dependancy claim - Road traffic accident - Question of liability; pleadings - Parties bound by their pleadings.*

EVIDENCE: *Hearsay evidence - Admissibility.*

This claim was brought by the widow and the defendants of a motorcyclist who died as a result of an accident. The motorcyclist hit the back of a bus and was catapulted into the air. Upon landing the force of the impact caused his death. The bus driver and the bus company were both sued. Although the defence did not deny liability, the 1st defendant denied all knowledge of the accident in his testimony. The only eye witness was an oncoming lorry driver.

Held:

[1] That the deceased and the 1st defendant were equally to blame.

(a) The deceased should not have attempted to overtake when there was an oncoming lorry or at the very least should have been able to pull up.

(b) The 1st defendant, who should have had both the oncoming lorry in sight and the motorcyclist on his rear view mirror, should have made appropriate allowances before slowing down, particularly as there was no compulsion for him to stop at the junction and not a little beyond.

[2] It is trite law that parties are bound by their pleadings.

[3] Hearsay evidence admissible to show that it was made but not as proof of the truth of its contents.

[Order accordingly.]

Cases referred to:

Esso Petroleum Co. Ltd. v. Southport Corporation [1956] AC 218
Haji Mohd. Oom v. Sakimen [1956] MLJ 45
Subramaniam v. PP [1956] MLJ 220
Haron v. Macaulay [1969] 1 MLJ 169
De Cotta v. Tan Hock Lee [1952] 2 MLJ 173
Chop Song Heng v. Thevanasam and Ors. [1975] 2 MLJ 3
Qualcast (Wolverhampton) Ltd. v. Haynes [1959] AC 743
Chan Loo Kee v. Lai Siew San and Anor. [1971] 1 MLJ 253
Ratnasingam v. Kow Ah Dek [1982] PC App No 5

For the plaintiffs - S.S. Gill; M/s. S.S. Gill & Co.
For the defendant - V. Arunachalam; M/s. Sault & Co.

JUDGMENT

Mahadev Shankar J:

This case is yet another example of that old adage that "Accidents don't just happen. They are caused."

On the 16 April 1978 Abdul Talib bin Abas, hereafter referred to as the deceased, was riding a motorcycle No. JT 719 along the Jalan Rengam road towards Kluang. At about 0930 hours he arrived at the junction of that road and a side road on his right leading to the new village of Sungei Sayong. As can be seen from the sketch plan, key and photographs, the Ketua Polis Balaji Rengam later found the deceased's body lying across the centre of the road. He was quite dead.

Since the deceased is not here to speak for himself I felt obliged to consider the independent evidence in some depth, the more so as the eye witness accounts on either side created far more problems than they solved.

The road at the scene is quite straight for some distance in both directions from the accident spot - estimated by PW1 at about 200 meters one way and 300 the other, and at 300 feet on either side by the defendant. It was 21' 6" wide. Facing Kluang there was a junction on the right where a side road led to the New Village of Sg. Sayong. The last photograph seems to suggest that there was a dip in the road beyond the junction but the extent to which this feature may have masked an oncoming vehicle, is a matter for speculation. Although no evidence was led as to where or who took these pictures, it seems in order to infer that they were taken not too long after the accident since the body of the deceased and his machine are both shown, *in situ*, on the road.

Two other photographs of the rear of the bus JF 5870 are of greater interest. They purport to show a scratch mark on the rear off-side corner of the bus a few inches above the reflector. The defendant's evidence suggests that these two photographs were taken either at the police station or the RIMV Johor Baru where the bus was subsequently sent. The photographs were taken because they must have been thought to afford some evidence of the point of impact. But no witnesses were called to shed any light on the height of this mark from the ground, whether it would have matched some part of the motorcycle (the left handle-bar perhaps), or whether there were any paint or rubber stains on either vehicle which could be traced to the other. It is to answer such questions, in addition to roadworthiness, that accident vehicles are sent to vehicle examiners at the RIMV.

In the absence of other supporting material I would have had some difficulty in holding that the testimony produced in aid of the plaintiff's case had crossed the gap between evidence to proof. As will shortly be seen that critical distance here was more in the nature of a chasm. But, notwithstanding the denial by the defendant, (which I shall shortly deal with) a defence was filed admitting that a collision had taken place between the two vehicles.

It is trite law that parties are bound by their pleadings. *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] AC 218 came to Malaysia more than a quarter of a century ago, (see also *Haji Mohd. Oom v. Sakimen* [1956] MLJ 45) and the doctrine of supremacy of pleadings still has us in thrall.

Any further analysis of the evidence can therefore only proceed forward on the basis that a collision did in fact take place between the deceased's motorcycle and the defendant's bus. This taken together with the dead body and the machine on the road must lead to the inference that the collision was one direct cause of the death which followed.

The plaintiffs called only one witness - Encik Mayandi a/1 Chelliah. His Police Report is in the Agreed Bundle at AB3. The salient features of this document are that he was driving his motor lorry JK 7423 that morning, with two others on board. He approached the scene from Kluang. He saw a bus coming from the opposite direction. It was in the course of stopping to pick up passengers. At the same time he saw a motorcycle proceeding in the same direction as the bus. He then saw the motorcycle colliding with the rear of the bus, and becoming airborne towards the right of the road. He heard the sound of an impact, "Pum", but was unable to say if it came from the bus or from his lorry. He stopped, alighted from his lorry and saw a male person straddled across the centre of the road.

His testimony in Court was quite at variance with this report. In his examination in chief he said he saw no passenger waiting for the bus. In cross-examination he was unable to explain this discrepancy. The only other points about his evidence I feel obliged to highlight is that at first sight the motorcycle was 5 to 10 meters behind the bus and proceeding in the same direction. After the accident he stopped only about 100 meters beyond. He did not get down. Another motorist came up to him and accused him of knocking down the motorcyclist. (As Mr. Arunachalam pointed out this is hearsay evidence but I did not agree that it was inadmissible. It is, admissible to show it was made but not as proof of the truth of its contents: vide *Subramaniam v. PP* [1956] MLJ 220). This motorist insisted that PW1 get down. But he did not, preferring instead to bolt off to the comparative safety of the Police Station with the motorist in hot pursuit. There was thus a second point on which his credibility was in doubt i.e. whether he alighted from his vehicle.

On the other side of the scales, the defence called only one witness - the defendant himself Mohamed bin Salleh. I must say that I was impressed by his demeanour and carriage. He had that refreshing capacity for subjective truth which is still our good fortune to find amongst rural folk. His case was simplicity itself. He had about 20 passengers that day seated mostly near the exit door. Yes, he had slowed down at the Sg. Sayong junction but he did not stop because nobody asked him to and there were no passengers to be picked up. As to any suggestion of a collision the man was adamant. He did not know of any. He had heard nothing. He had seen nothing. He had blithely carried on from the Sg. Sayong junction to Kluang, in blissful ignorance that anything was amiss. There he deposited his passengers and returned to Rengam where the Sergeant was waiting for him at the bus station. He was told there had been an accident involving his bus, which he denied. At the Police Station he did not accept that the scratch marks found by the Sergeant had anything to do with any accident. He did not know of any accident. Had there been one, the conductor and passengers would have altered him but they did not.

I have had no satisfactory explanation of how it came about that when the defendant denied a collision, his pleading admits it. Having expressed it as my opinion that the defendant struck me as a witness of truth, it is with some regret that I must find that his lack of knowledge of any accident must imply a finding that he was driving without due care and attention; and had not been keeping a proper look-out. On this count alone some negligence must be laid at his door.

As to Encik Mayandi I hold it as credible that the bus did slow down that day perhaps a little abruptly. I also hold as a fact that the deceased did collide with the rear of the bus and that the force of the impact catapulted him in to the air to the right.

What cannot be predicated with any certainty is what happened after that and before the deceased's body came to rest. Whether he suffered a further impact with the oncoming lorry is very much on the cards.

Three cases were cited to me on the question of apportionment: *Haron v. Macaulay* [1969] 1 MLJ 169; *De Cotta v. Tan Hock Lee* [1952] 2 MLJ 173; and *Chop Song Heng v. Thevanasan and Ors.* [1975] 2 MLJ 3.

I invited the attention of Counsel to a fourth on the proper approach to the value of findings of fact in negligence cases as judicial precedent *viz. Qualcast (Wolverhampton) Ltd. v. Haynes* [1959] AC 743.

I agree with Mr. Arunachalam that a motorist who is following another has a duty to take care of his own safety by not following too close. It behoves him to drive within the limits of his vision subject of course to the caveats placed on other motorists in front of him stopping abruptly on a main highway; see *Chan Loo Kee v. Lai Siew San and Anor.* [1971] 1 MLJ 253.

Taking all the circumstances into consideration I apportion liability in this case thus. I hold the deceased and the defendant equally to blame. In a nutshell, the deceased should not have attempted to overtake when there was an oncoming lorry, or at the very least should have been able to pull up. The defendant who should have had both the oncoming lorry in sight, and the motorcyclist on his rear view mirror, should have made appropriate allowances before slowing down, particularly as there was no compulsion for him to stop at the junction and not a little beyond.

In concluding my remarks on liability I would commend all concerned with running down actions to take serious note of the comments of Lord Scarman in *Ratnasingam v. Kow Ah Dek* [1982] PC App No

The accident here occurred on 16 April 1978, nearly 5½ years ago. It makes life difficult for everyone if cases are not despatched with due expedition, not least for Counsel who may no longer be able to trace witnesses and even where they find them, discover that they are left to make bricks without straw because their witnesses' memories have failed them.

Parties have agreed quantum at RM24,200 for general damages and RM800 for special damages.

There will be judgment for the plaintiffs for RM12,500. I also award interest thereon at 8% p.a. from 28 February 1979. The plaintiffs will also have the costs of the action.

Since there are minor beneficiaries involved I also direct that there be a separate application by plaintiff as to how this money should be distributed and that meanwhile the sum be held by plaintiff's solicitors upon Mr. Venga's undertaking that he will distribute the same as the Court orders.

Orders accordingly.

Also found at [1983] 2 CLJ 267